No. 87-2132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

—and— *Appellants*,

LEGISLATURE OF THE VIRGIN ISLANDS,

Appellant,

—v.—

THE WEST INDIAN COMPANY, LIMITED,

Appellee,

—v.—

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF APPELLEE THE WEST INDIAN COMPANY, LIMITED TO DISMISS OR AFFIRM

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July 29, 1988

QUESTIONS PRESENTED

I. Does an appeal as of right lie under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals holding a statute enacted by a territorial legislature unconstitutional?

II. Where the Government of the Virgin Islands, acting for a valid public purpose, has settled a longstanding dispute with respect to rights to submerged lands, and the settlement agreement has been ratified by the Legislature of the Virgin Islands after due deliberation, does a subsequent Legislature's unilateral repeal of the settlement agreement for reasons unrelated to a proper exercise of police power violate the Contract Clause of the Constitution?

III. Have the Citizen-Intervenors and the Legislature of the Virgin Islands raised substantial federal questions, warranting plenary briefing and argument on the merits, concerning the validity of a 1982 settlement agreement between the Government of the Virgin Islands and a private entity?

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Pursuant to Rule 16.1, appellee The West Indian Company, Limited ("WICO")[1] moves to dismiss the appeals of the Legislature of the Virgin Islands ("Legislature") and the Citizen Intervenors Helen Gjessing, individually and as President of Save Long Bay Coalition, Inc., Leonard Reed, individually and as President of Virgin Islands Conservation Society, Inc., Kate Stull, individually and as President of League of Women Voters of V.I., Inc., Lucien Moolenaar, individually and as President of Virgin Islands 2000, Inc., and Ruth Moolenaar, individually and as Director of St. Thomas Historical Trust, Inc. ("Citizen Intervenors"). The motion to dismiss is based on the fact that these appeals are not within this Court's jurisdiction under 28 U.S.C.A. § 1254(2), the jurisdictional statute relied upon by appellants.

In the alternative, pursuant to Rule 16.1(c), WICO moves to affirm the judgment of the United States Court of Appeals for the Third Circuit, entered March 31, 1988 and reported at 844 F.2d 1007 (3rd Cir. 1988), on the ground that the decision below is manifestly correct and does not present a substantial federal question which warrants further briefing and argument.

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1 Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, parent companies of the The West Indian Company, Limited include The East Asiatic Company Ltd. A/S (Denmark), EAC USA Inc. (Delaware), and EAC Nevada Inc. (Nevada). Affiliates of The West Indian Company, Limited include the following: Baumfolder Corporation (Ohio), Baumfolder Delaware Inc. (Delaware), Heidelberg Eastern, Inc. (Delaware), EAC Graphics USA Inc. (Massachusetts), DAK Foods, Inc. (Delaware), The East Asiatic Company (Canada) Inc. (Delaware), Plumrose Canada Inc. (Canada, Federal Charter), The East Asiatic Company de Mexico, S.A. (Mexico), The East Asiatic Company's Holding Co. (Cayman Islands) Ltd., The East Asiatic Company (Cayman Islands) Ltd., and EAC Delaware Inc. (Delaware).

STATEMENT OF FACTS

This case arises out of the repudiation by the Sixteenth Legislature of the Virgin Islands of a settlement agreement between WICO and the Government of the Virgin Islands, which had been ratified by two prior Legislatures. The repudiation took the form of legislation[2] repealing two prior legislative enactments recommending and ratifying the settlement of a long-standing dispute which clouded title to a portion of St. Thomas Harbor. The Repeal Act was promptly vetoed by the Governor on the ground that it was a "sad betrayal of the public trust" (WICO App. la).[3] Thereafter, the Sixteenth Legislature overrode the Governor's veto and passed the Repeal Act into law (Joint App. 175a).

The settlement agreement at issue consists of a formal written agreement entitled Memorandum of Understanding, dated as of the 3rd day of October, 1973, among the United States Department of the Interior, the Government of the Virgin Islands, WICO, and others (hereinafter "1973 Memorandum") (Joint App. 117a), as amended by further written agreements dated October 28, 1975 (hereinafter "First Addendum") (Joint App. 145a), and September 23rd, 1981 (hereinafter "Second Addendum") (Joint App. 151a).

The Second Addendum was the final resolution of an ongoing dispute relating to rights granted to WICO by the Danish Government to reclaim and fill in a portion of St. Thomas Harbor. Those rights were specifically guaranteed in the 1917 Treaty of Cession (hereinafter "Treaty") between the United States and Denmark relating to the Virgin Islands (Joint App. 98a). The Treaty, Article 3, provides:

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2 Act No. 5158, Sixteenth Legislature of the Virgin Islands (Bill No. 16-0607), hereinafter the "Repeal Act" (Joint App. 175a).

3 Pursuant to Rule 16.3, WICO, as appellee, respectfully submits an appendix in conjunction with its present motion. In order to avoid duplication, WICO includes in its appendix ("WICO App.") only pertinent documents omitted from the Joint Appendix to Jurisdictional Statements ("Joint App.") filed by appellants.

4) The United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:

   a. The concession granted to 'Det vestindiske Kompagni' (the West-Indian Company) Ltd. by the communications from the Ministry of Finance of January 18th, 1913 and of April 16th, 1913 relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor.

(Joint App. 101a).

The January 18th, 1913 letter from the Danish Finance Ministry referred to in the Treaty granted WICO the right to reclaim and fill a substantial area at Long Bay in St. Thomas Harbor (Joint App. 113a). WICO built its existing dock in a portion of that area in 1914, leaving approximately 42 acres for future reclamation.

In 1968, the United States commenced an action against WICO and others to quiet title to certain reclaimed lands within the area of WICO's Danish grant and to obtain an adjudication that WICO's rights to reclaim had lapsed. *United States v. West Indian Company Ltd., et al.*, District Court of the Virgin Islands, Civil No. 337-1968 (hereinafter the "1968 lawsuit") (Joint App. 85a *et seq.*). WICO defended on the grounds that (a) the grant of the right to reclaim was vested and in perpetuity, and (b) in any case, the unexercised rights could not be terminated without first giving WICO notice and the opportunity to complete. WICO's position was supported by a formal diplomatic note from the Danish Government dated June 25th, 1970, which stated that WICO's treaty rights originally had been granted by the sovereign Denmark without condition as to time and requested that those rights be respected (WICO App. 4a-5a).

While the 1968 lawsuit was pending, WICO made a settlement proposal to the United States Department of the Interior and to the Virgin Islands Government, the latter of which was not formally a party to the litigation. Essentially, this proposal involved WICO relinquishing its claim to approximately 12 acres and retaining its claim to 30 acres, in exchange for which the United States and Virgin Islands Governments would recognize WICO's right to reclaim and ultimately obtain fee simple title. In addition, the Virgin Islands Government would reserve the right to acquire these lands or rights of WICO by eminent domain or condemnation, but not otherwise.[4] Judge Warren Young, the presiding judge, made a formal written recommendation in favor of the settlement to the Virgin Islands Government on the grounds that WICO was likely to prevail in the lawsuit and that the settlement proposal appeared to meet all local government objectives (Joint App. 90a).[5]

The Ninth Legislature of the Virgin Islands, after conducting public hearings, approved Act No. 3326, recommending the settlement on October 30, 1972 (Joint App. 178a). Thereafter the Government of the Virgin Islands, the United States Government and other private parties with interests in the harbor executed the 1973 Memorandum. The 1973 Memorandum was filed with the Court, which stayed the action pending completion of the conditions set out in the agreement, subject to quarterly status reports to the Court (WICO App. 6a-7a).

The 1973 Memorandum adopted a two-step procedure for transferring title to the 30 acres to WICO after reclamation in

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4 Other important conditions of the proposal are described in the decision below, at 844 F.2d at 1010 (Joint App. 11a-12a).

5 WICO objects to Citizen Intervenors' characterization of Judge Young's effort to settle the 1968 lawsuit as "certain coercive acts." Judge Young encouraged the Governor of the Virgin Islands, Melvin Evans, to recommend the Memorandum of Understanding to the Secretary of the Interior, since the principal beneficiary of the Memorandum was the Government of the Virgin Islands. Judge Young's letter was sent to members of the Virgin Islands Legislature, and all interested counsel, and constituted nothing more "coercive" than a District Court Judge characterizing a proposed settlement, in light of all the circumstances, as desirable.

order to comply with the 1963 Territorial Submerged Lands Act[6] then in force (Joint App. 188a). The United States, which held title to the submerged lands surrounding the Virgin Islands, would convey to the Virgin Islands Government, which in turn would convey to WICO.

Shortly after the 1973 Memorandum was executed, the 1974 Territorial Submerged Lands Act[7] transferred title of submerged lands in the Virgin Islands from the Federal Government to the Government of the Virgin Islands, "subject to all valid existing rights" (hereinafter "1974 Act") (Joint App. 192a). Because the need for a two-step transfer procedure was eliminated by the 1974 Act, the First Addendum to the 1973 Memorandum was executed (Joint App. 145a). In substance, the First Addendum substituted the Virgin Islands Government for the Government of the United States in all respects.

In 1977, while WICO was engaged in the environmental impact process with the U.S. Army Corps of Engineers, the Virgin Islands Government passed into law the Coastal Zone Management Act ("CZMA") (Joint App. 207a).[8] WICO advised the Virgin Islands Government that application of the CZMA to its interests would constitute a material breach of the 1973 Memorandum in the following respects: the CZMA forbade conveyance of title to submerged lands; the CZMA imposed rental charges and charges for dredge fill; the CZMA imposed substantial zoning restrictions; and the CZMA made reclaiming and uses a discretionary matter (Joint App. 198a-204a). WICO also made it clear that it would file suit to vindicate its position that the CZMA could not be applied to its rights as recognized in the settlement agreement.

In response to WICO's contention that full application of the CZMA would constitute a material breach of the 1973 Memorandum, as amended, the Virgin Islands Government retained as special counsel Professor Ira Michael Heyman, a leading

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6 Pub. L. No. 88-183, 77 Stat. 338.

7 Pub. L. No. 93-435, 88 Stat. 1210 (amended 1980).

8 V.I. Code Ann., Tit. 12, 901-14 (1977).

professor of land law at the University of California at Berkeley, who had been the draftsman of the CZMA, and a colleague, Donald Gralnik of a Los Angeles law firm, together with an Assistant Attorney General of the Virgin Islands. Extended negotiations on the CZMA issue resulted in the Second Addendum (Joint App. 151a). WICO's reclaiming area was further reduced in the Second Addendum from 30 acres to approximately 15 acres, of which the Virgin Islands Government would obtain one acre, with WICO agreeing to provide retaining structures for the Government. The Third Circuit Court of Appeals accurately summarized the other essential terms of the Second Addendum as follows:

> There are many additional conditions in the Second Addendum. WICO agreed, for example, to specified zoning restrictions and specified limited uses, to a height restriction of three stories, and to reserve a certain percentage of its area for "usable open space." § 11(b). These agreed-upon restrictions, however, apply only to development commenced within ten years of reclamation and completed within 15 years of reclamation; any development not commenced or completed within these time limits, and "any development beyond that explicitly contemplated by this Agreement," is controlled instead by the "then current laws," the CZMA or its future equivalent. § 12(a). In addition, the Second Addendum provides that "as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit." § 12(b). The Virgin Islands Government, for its part, agreed in the Second Addendum that WICO was not to be subject to the charges mandated by § 911 for rental of or removal of dredge fill from publicly-held lands, and that WICO was to be able to use its land free of the use or rental charges imposed by § 911 on publicly-held land. § 19(e).
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> * * *
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> The Second Addendum follows the Memorandum in stating that when the specified acreage has been reclaimed,

> "WICO shall have title to and ownership of the areas filled . . . provided that WICO is then in compliance with Section 2 of this Agreement requiring WICO to fill and provide land for the V.I. Government," and that "[e]xcept as otherwise specifically provided herein, this Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and assigns." § 16(b). The Second Addendum also specifies that nothing contained in it is to affect the rights of the United States or Virgin Islands Governments to acquire by eminent domain or condemnation the lands covered by the Addendum. § 19(a).
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> (Joint App. 17a-18a).

Because the Second Addendum contemplated specific revisions in the CZMA, and indeed could not be implemented without such revisions, the Second Addendum was conditioned on the enactment of appropriate enabling legislation. The Second Addendum was recommended by the Government's special counsel as favorable to the Government (WICO App. 8a-10a), and was thereafter executed by Governor Luis. The enabling legislation which ratified the Second Addendum was enacted by the Fourteenth Legislature as Act No. 4700 (Joint App. 176a).

The Second Addendum thus was a carefully negotiated document which settled prospective litigation between WICO and the Virgin Islands Government over the question of whether the CZMA could be applied in its entirety to WICO's rights as previously defined in the Memorandum of Understanding. The Second Addendum accommodates the environmental and zoning objectives of the CZMA and WICO's recognized rights to reclaim, develop, and own the filled land, which existed prior to the CZMA's enactment. WICO agreed to provide structural improvements agreeable to the Federal Government "or the judgment of the V.I. Government" (Joint App. 152a), agreed to specified time limits for commencing filling (Joint App. 152a-153a), agreed to provide underwater surveys for the approval of the Virgin Islands Government (Joint App. 157a),

agreed to place its dredging under the monitoring of the Virgin Islands Department of Conservation and Cultural Affairs (Joint App. 159a), and agreed to certain specified uses for the filled land (Joint App. 165a),[9] height restrictions (Joint App. 165a), and usable open spaces (Joint App. 166a). The Second Addendum was, in addition, a substantial limitation of WICO's rights under the Memorandum of Understanding in terms of the acreage to be reclaimed (*i.e.*, 15 acres reduced from 30 acres).

On April 16, 1984, the District Court entered an order *sua sponte* dismissing the 1968 lawsuit under Fed.R.Civ.P. 41(b) for failure to prosecute. No appeal was taken and no motion to reopen was made under Fed.R.Civ.P. 60(b).[10]

In reliance on the Second Addendum, WICO embarked on a lengthy and expensive process preparatory to dredging and reclaiming. After public hearings, a Virgin Islands Coastal Zone Permit (WICO App. 11a-18a) (issued in part on the basis of opinions from legal counsel to the Governor and the Legislature, and from the Attorney General (WICO App. 20a-27a)) and a U.S. Army Corps of Engineers permit were issued (WICO App. 28a-35a).[11] WICO spent over $400,000 for legal, engineering and environmental services during the permitting and bid processes, after execution of the Second Addendum (WICO App. 36a).

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9 Citizen Intervenors' reference to WICO's "undisclosed development purposes" (Citizen Intervenors' Jurisdictional Statement, pp. 10-12) is highly misleading; the Second Addendum plainly listed specific permissible uses for the reclaimed land (Joint App. 165a).

10 The Citizen Intervenors unsuccessfully sought to reopen the 1968 lawsuit in connection with this proceeding.

11 Citizen Intervenors' characterization of WICO's permits as having been obtained "without following standard statutory procedures" (Citizen Intervenors' Jurisdictional Statement, pp. 6-7) is baseless. The inference that WICO obtained its permits in anything less than proper fashion is wholly unsupported by the record as reflected by appellants' failure to cite any part of the Joint Appendix to substantiate this charge.

In June 1986 site preparation and dredging began. After this process began, without prior warning, the Virgin Islands Legislature called itself into special session and passed the Repeal Act on July 9, 1986. There was no report; contrary to the Legislature's present position before this Court, the Legislature's debate on the Repeal Act is devoid of any discussion of environmental or ecological concerns.[12] In fact, the principal, if not exclusive, issue was the repudiation of WICO's right to title to the submerged lands.[13]

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12 At only one point in the debate does any Senator express any arguable environmental concern, and even then it is a concern about tourism, not the environment:

> And I say to you, that I have learned from sources that part of their intention is to bunker fuel on that site. If we have not learned from our experience with the oil spill that we had recently if we had not learned that, that could mean the total destruction of the toruism (sic) industry for another oil spill to occur here in this harbor.

Senator Magras, Transcript, Sixteenth Legislature of the Virgin Islands, July 9, 1986. Legislature Debate (hereinafter "Legislature Debate"), Part I p. 67 (WICO App. 43a).

13 Contrary to the Legislature's present contention that the intent of the Repeal Act was "to avoid infringing whatever title WICO may have had in that land" (Legislature's Jurisdictional Statement, p. 11), the legislative record shows that the Senators challenged the very existence of WICO's rights as a "vestige of colonialism":

> Senator O'Bryan, Jr.: ". . . [M]y concern relatieve [sic] to West Indian Company claim goes back to the basic treaty. I basically, categorically reject the right of any foreign entity to maintain control over the submerged land of this territory for seventy-three years."
>
> ". . . I do not subscribe to the issue of an agreement being an agreement. The agreement we talk about is an agreement that is vestiged with colonialism and its root cause." Legislature Debate, Part I pp. 62-63 (WICO App. 41a).
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> Senator Berry: ". . . [W]hen I vote today to repeal that contract it's based on the fact that I don't want any colonial power trying to control any land in these islands. . . ." Legislature Debate Part I p. 74 (WICO App. 45a).

In short, the debates make it clear that the purpose of the Repeal Act was to strip WICO of its rights to hold title:

> Senator Bryan: "We have to get clear on that; submerge (sic) land is trust territory; nobody, this government, this legislature, the

Shortly after passage, the Governor vetoed the Repeal Act, stating:

> This bill would dishonor Virgin Islands Government commitments to The West Indian Company Ltd. (WICO) that have been entered into, after long and careful deliberation, on several previous occasions.
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> . . . Notwithstanding the apparent perception of the nine members of the Legislature who voted to repeal the WICO agreements that they were responding to substantial public opinion on the dredging issue, their action is in reality a sad betrayal of the public trust.

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judge cannot give away trust land." Legislature Debate Part I, p. 45 (WICO App. p. 38a).

". . . The legislature was—the First, the Sixth or the Thirteenth, or the Seventeenth or Twentieth, has no legal authority to sell or transfer trust land." Legislature Debate Part I p. 46. (WICO App. 38a).

". . . [t]hese land (sic) belong to the people of the Virgin Islands. We are going to take it back, even if we have to go— I am not accepting their excuse there's a contract. There's no contract. I want the land back; it's ours." Legislature Debate Part I p. 47 (WICO App. 39a).

Senator Brown: "What we are talking about are rights, title and ownership. It is this government that should have the right and title, and if we want to let West Indian Company dredge and fill, we let them do it at our discretion, on our land." Legislature Debate Part I p. 61 (WICO App. 40a).

Senator Magras: "There is no country, Denmark, the United States nor the Virgin Islands that allow any individual or corporation to own submerged land." Legislature Debate Part I p. 65 (WICO App. 42a).

Senator Berry: ". . . [T]his body didn't have the authority to give title of submerged lands to a private entity, and since you didn't have that authority, the contract is invalid." Legislature Debate Part I, pp. 73-74 (WICO App. 45a).

Senator Bryan: "The repeal of those acts, in fact, would stop West Indian Company and those involved believing that that land was West Indian Company land. It is not West Indian Company land." Legislature Debate, Part II, p. 43 (WICO App. 46a).

> In the instant case, the better judgment of two-thirds of the members of the Legislature has been sacrificed to the opinions of a few vocal and misguided individuals who have successfully capitalized on the re-election fears of these "community followers".
>
> (WICO App. 1a-3a).

On August 11, 1986, the Legislature in special session voted to override the veto. The Repeal Act thus became law, and WICO immediately sought a temporary restraining order and preliminary injunction against interference with its rights in the District Court of the Virgin Islands. Significantly, the Attorney General of the Virgin Islands declined to represent the Government in this case on the grounds that to seek to uphold the Repeal Act would violate his obligations under Rule 11 of the Federal Rules of Civil Procedure, and might constitute a breach of the Canon of Ethics (Joint App. 21a).

On August 26, 1986, the District Court of the Virgin Islands heard WICO's request for a preliminary injunction. District Judge O'Brien correctly noted that prior to the 1986 Repeal Act:

> three successive elected governors, their respective attorneys general, and two separate Legislatures of the Virgin Islands have recognized WICO's right to dredge and reclaim certain defined submerged lands in the harbor of Charlotte Amalie. The various officials described above successfully negotiated limits with respect to both acreage and time as to WICO's rights, and gained important concessions in favor of the territory. The reason for this case is that the Sixteenth Legislature, now sitting, takes issue with the validity of the actions undertaken by the territorial officials above described.
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> [Joint App. 59a-60a].

WICO's motion for a preliminary injunction was granted (643 F. Supp. 869) (Joint App. 53a); an appeal was filed and the District Court's decision was affirmed *per curiam* by the United

States Court of Appeals for the Third Circuit (812 F.2d 134) (Joint App. 50a). Subsequently, the District Court granted summary judgment for WICO on the merits and permanent injunctive relief from interference with WICO's rights under the Memorandum of Understanding and the Second Addendum (658 F. Supp. 619) (Joint App. 41a).

The District Court's order granting a permanent injunction on behalf of WICO was appealed to the United States Court of Appeals for the Third Circuit by the Citizen Intervenors and the Legislature. The Court of Appeals affirmed the decision of the District Court without dissent on March 31, 1988 (844 F.2d 1007) (Joint App. 6a). Notice of appeal by Citizen Intervenors was filed with this Court on April 21, 1988 and notice of appeal was filed by the Legislature on June 13, 1988.

These appeals essentially raise the same issues considered at length by the District Court and the Court of Appeals in connection with the temporary restraining order and preliminary injunction, the interlocutory appeal from the preliminary injunction, the grant of summary judgment and a permanent injunction in favor of WICO, and the appeal of summary judgment and permanent injunctive relief to the Third Circuit Court of Appeals.

ARGUMENT

I. The Appeals Must Be Dismissed Because The Repeal Act Is Not A "State Statute" For Purposes of 28 U.S.C. § 1254(2).

All appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1254(2), which states that "[c]ases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: . . . (2) by appeal by a party relying on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, . . . and the review on appeal shall be restricted to the federal questions presented."

The Jurisdictional Statement of the Legislature states that the Supreme Court "has apparently not yet determined whether the invalidation of a territorial statute confers appellate jurisdiction

under 28 U.S.C.A. § 1254(2)." (Legislature's Jurisdictional Statement, p. 3). That is incorrect. *In Fornaris v. Ridge Tool Company*, 400 U.S. 41, 42 n.1 (1970), the Court ruled that "a Puerto Rican statute is not a 'state statute' within 1254(2)."

The plain language of § 1254(2) clearly does not encompass constitutional rulings with respect to territorial statutes. Consistent with the practice of strictly construing statutes which authorize appeals, this Court has stated that an expansive interpretation of the word "state" is precluded. *Id.*; *see also California Coastal Commission v. Granite Rock*, ____ U.S. ____, 107 S.Ct. 1419, 55 U.S.L.W. 4366, 4368 (1987) ("statutes authorizing appeals are to be strictly construed"); *Palmore v. United States*, 411 U.S. 389, 396 (1973) ("A reference to 'state statutes' would ordinarily not include provisions of the District of Columbia Code . . . Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' "); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1983), *reh'g denied*, 465 U.S. 1074 (1984).

In holding that a Puerto Rican statute is not a State statute within § 1254(2), this Court in *Fornaris* distinguished 28 U.S.C. § 1258. The *Fornaris* Court found it significant that Section 1258 has an express provision for appeals to the Supreme Court of constitutional rulings with respect to Puerto Rican statutes and that Section 1254(2) had no such parallel provision.

The Citizen Intervenors attempt to distinguish *Fornaris* by pointing out that Section 1258 provides this Court with jurisdiction over appeals of final judgments or decrees rendered by the Supreme Court of Puerto Rico, but that no statute specifically provides for appellate jurisdiction over decisions invalidating territorial legislation. Thus, the Citizen Intervenors argue that if Section 1254(2) is strictly construed, they "will be denied equal access to the Supreme Court of the United States and will be precluded from exercising their due process right to seek review as a matter of right by the Supreme Court of the United States" (Citizen Intervenors' Jurisdictional Statement at pp. 2-3, n.1).

Apart from the attempt to create novel rights to Supreme Court appellate review, the argument of the Citizen Intervenors is wide of the mark as a factual matter. Section 1258 only permits Supreme Court review by appeal where a Puerto Rican Statute has been upheld as being *constitutional*, but where the statute has been held *unconstitutional*, review by the Court must be by writ of certiorari. In this case, the Third Circuit affirmed the District Court's holding that the Repeal Act is unconstitutional.

Moreover, a review of the legislative history of Section 1258 reveals a dual purpose for its enactment and undermines Appellants' jurisdictional argument. First, Congress intended to increase judicial efficiency. Prior to the enactment of Section 1258, the Court of Appeals for the First Circuit reviewed final judgments and decrees of the Supreme Court of Puerto Rico. The First Circuit's decisions were then subject to review by the Supreme Court of the United States pursuant to the usual provisions for review of decisions of the courts of appeals. Section 1258 eliminated the First Circuit from the review process in an effort to promote judicial economy.[14]

Second, Congress intended to acknowledge the change in status of Puerto Rico "*from that of a territory to that of an associated Commonwealth . . .*" *Id.* (emphasis added). Thus, Puerto Rico, as a Commonwealth, enjoys a different status from that of the Virgin Islands, which is an "unincorporated territory." *See Water Isle Hotel v. Kon-Tiki, Inc.*, 795 F.2d 325, 327 (3d Cir. 1986) ("By statute the Virgin Islands is specifically designated as an unincorporated territory which does not enjoy the autonomy of a state within the union"); *see also U.S. v. Santiago*, 576 F.2d 562, 563 (3d Cir. 1978) ("Congress is not obliged to extend provisions of every federal statute to the territories").

This Court should not depart from the well-established practice of strictly construing jurisdictional statutes. Accordingly, WICO respectfully moves this Court to dismiss the appeals of

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14 S.R. 735, 87th Cong., 1st Sess., *reprinted* in 1961 U.S. Cong. & Admin. News, 2248, 2248-49.

Citizen Intervenors and the Legislature on the ground that this Court has no jurisdiction under 28 U.S.C. § 1254(2).

II. The Court of Appeals' Decision That The Legislature's Repudiation of the Settlement Agreement Through the Repeal Act Violated the Contract Clause of the Constitution Is Manifestly Correct and Does Not Warrant Further Review.

The issue of whether the Repeal Act violated the Contract Clause of the United States Constitution has been addressed by the District Court of the Virgin Islands in two separate decisions, and by the United States Court of Appeals for the Third Circuit twice, five different judges sitting. In its most recent pronouncement, the Third Circuit properly found that the Second Addendum and its enabling legislation constituted "unambiguous evidence . . . of legislative intent to create enforceable private rights in WICO and that the Second Addendum was intended by all concerned to be a binding contract between WICO and the Virgin Islands Government." 844 F.2d 1007, 1017 (Joint App. 27a-28a).

The Citizen Intervenors argue that police power cannot be limited by contract. This argument flies in the face of Supreme Court precedent:

> If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978), *reh'g denied* 439 U.S. 886 (1978).

The Supreme Court enunciated a three-part test in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) for cases in which Contract Clause claims must be balanced against legislation passed in exercise of the state's police power. As the Third Circuit correctly noted, that three-part test was not satisfied by the Repeal Act. 844 F.2d at 1022

(Joint App. 37a-39a). The Court noted that the first prong of the test was satisfied, *i.e.*, the law operated as a substantial impairment of a contractual relationship; but held that the Repeal Act did not meet the second prong of that test, namely, it was not justified by significant and legitimate public purpose. The Repeal Act was aimed solely at WICO and no pressing public purpose was identified either in the Act itself or in the Legislature's debate prior to passage. The Legislature's present position that the Repeal Act constituted proper exercise of the Government's police power to regulate an environmentally sensitive area, and was not intended to contest WICO's rights to the lands, is a futile attempt to rewrite history.[15]

The Second Addendum directly addresses both title and quality of title conveyable. The Repeal Act by its terms, repudiates the Second Addendum *in its entirety*. The Repeal Act places squarely in question the quality of title, if any, which WICO might ever hold. Only the most tortuous reading of the Repeal Act, coupled with ignorance of the legislative debate which accompanied passage of the Act, can support the conclusion that the Act was aimed at protection of the environment as opposed to stripping WICO of its right to reclaim and its prospective title to the lands in question. The effect of the Repeal Act is to abrogate the basic obligations of the Government under the Second Addendum. It was not, as the Jurisdictional Statement of the Legislature asserts, simply an effort to require WICO to obtain certain development permits under the CZMA; as the debates indicated, it was an effort to strip WICO of *all* rights given it under the Second Addendum and, by sub-

15 The Legislature's attempt to equate the purpose of the Repeal Act with the environmental and zoning purposes of the CZMA is transparent and unsupported by the record. While ecology may have been one of the objects of the CZMA, the Repeal Act identifies no purpose in its legislative history except to strip WICO of its rights to reclaim and own those reclaimed lands. Further, the Repeal Act completely abrogated the Second Addendum, reducing WICO from prospective fee simple owner to prospective CZMA permit applicant.

stituting the CZMA in its place, reduce WICO to the status of a prospective applicant for CZMA permit.[16]

The Second Addendum requires the Government to convey title to the reclaimed areas (Joint App. 161a-162a). By reinstating the amended sections of the CZMA, the Government precluded itself from conveying title. CZMA Sections 911(a)(1) and (d) provide that trustlands or submerged lands of the Virgin Islands may not be developed or occupied without a permit or lease for development, and that an "occupancy or development lease shall only be granted . . . for a nonrenewable lease period of not more than 20 years." Under the Second Addendum, the Government is required to convey title without further payment by WICO, and is expressly precluded from imposing rental fees or charges (19(e)) (Joint App. 172a). CZMA Section 911(f)(1) requires the payment of a rental fee. The right guaranteed by the Second Addendum to build marinas without fee would be abrogated; marina construction requires both permits and rental fees.[17] The Second Addendum includes an express undertaking by the Government not to impose any charge for dredging (19(e); Joint App. 172a). CZMA Section 911(f)(2) requires the payment of a reclamation fee for dredging. The guarantee that WICO may engage in specific uses in the Second Addendum would be totally abrogated by the Repeal Act (11(b); Joint App. 165a).

Additionally, the CZMA requires that all submerged land permits be ratified by the Governor and the Legislature

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16 The Legislature's argument that the Repeal Act did not affect WICO's title because WICO could apply for a "fully renewable permit" of indefinite duration is disingenuous (Legislature's Jurisdictional Statement, pp. 9-11). The Second Addendum promised WICO fee simple ownership; the Repeal Act abrogated the Second Addendum completely. The Legislature's argument that fee simple ownership may be equated with a renewable permit of unspecified duration, which is then subject to approval of the Legislature and Governor of the Virgin Islands, is ironic in the circumstances of this case. After all, this is the same Legislature that made a solemn commitment to WICO in the Second Addendum and then turned its back on that commitment in response to political pressure.

17 *See* CZMA § 911(f)(1) and regulations (Joint App. 239a).

(911(e)), with the result that the issuance of a permit is discretionary. Indeed, after the Repeal Act's passage, the Commissioner of Conservation issued a stop order to WICO on the ground that the permit previously issued was no longer valid (Joint App. 205a-206a).

Far from advancing a broad public purpose, the Repeal Act was aimed solely at WICO.[18] Even assuming *arguendo* that the Repeal Act rose to the level of asserting a significant and legitimate public purpose, that in and of itself is not enough to justify the impairment of contractual relations:

> A court must also satisfy itself that the legislature's adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserve Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (quoting *United States Trust Co. v. New Jersey* 431 U.S. 1, 22 (1977)). But, we have repeatedly held that unless the State is itself a contracting party, courts should, "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group*, 459 U.S. at 413, (quoting *United States Trust Co.*, 431 U.S. at 23).
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> *Keystone Bituminous Coal Assoc. v. De Benedictis*, 480 U.S. ____, 107 S.Ct. 1232, 55 U.S.L.W. 4326, 4336 (1987).

In the instant case, the Court may not defer to the Legislature's judgment, as the Government itself is a contracting party.

It is significant that the courts below were not deceived as to the purpose and intended effect of the Repeal Act. The Attorney General of the Virgin Islands refused to defend the Repeal Act in court because, as the District Court noted, the executive

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18 The Repeal Act was retroactive in nature, and enacted without warning after WICO, in reliance on Act No. 4700, entered into a $1,700,000 reclaiming contract and commenced dredging.

branch "considered the repeal of WICO's rights to be invalid" (Joint App. 59a). After careful analysis the District Court concluded that the Repeal Act was a comprehensive elimination of WICO's rights: "the seal of the Legislature is put on a repudiation of WICO's original grant from the Government of Denmark, and the recognition of that grant by the Government of the United States" (Joint App. 76a). Likewise, the Court of Appeals concluded that ". . . WICO's contract rights are gravely impaired, *to the point of virtual annihilation*, by the Repeal Act." (Joint App. 37a, emphasis supplied).

Finally, contrary to the Citizen Intervenors' assertion that the Second Addendum constituted an attempt by a prior Legislature to contract away future police powers, the record plainly shows that the Second Addendum was a carefully drafted settlement agreement which recognizes and preserves the Government's police power. The Second Addendum was negotiated and signed after extensive consideration of all environmental and police power concerns now raised by the Legislature in its Jurisdictional Statement; the most compelling evidence that the CZMA's objectives were incorporated into the Second Addendum was the extensive participation in the negotiations by Professor Heyman, drafter of the CZMA, who outlined the contents of what would become the Second Addendum in his Memorandum to the Government of the Virgin Islands dated January 19, 1980 (WICO App. 8a-10a).

The Virgin Islands Government surrendered no essential attribute of its sovereignty in the Second Addendum. In fact, the Virgin Islands *gained* sovereignty over an additional 16 acres of submerged lands, over which it did not have clear title *prior* to the Second Addendum. In addition, the Second Addendum restricts the use of WICO's remaining acres, a direct acknowledgment of the Government's police power over lands which arguably were not subject to such police power by virtue of the Treaty rights granted WICO. The Court of Appeals expressly noted that it was not holding that the police powers of the Virgin Islands were exhausted with respect to WICO's 15 acres when the Second Addendum was approved (Joint App. 39a). "WICO is obviously not immune from generally applica-

ble police power measures not inconsistent with the Second Addendum" (*id.*). The critical point, however, is that the Repeal Act—which was nothing less than an attempt to repudiate WICO's rights—was not a proper exercise of the police power of the Virgin Islands.

III. Citizen Intervenors' Arguments That the Second Addendum Is Invalid Because It Improperly Promised To Convey Trustlands, Improperly Modified an International Treaty, and Improperly Promised to Convey Property Rights In Violation of the Common Law Rule Against Perpetuities, Do Not Present Substantial Federal Questions for Review by This Court.

The Citizen Intervenors are seeking further review of their repeatedly rejected argument that the Virgin Islands Government's agreement to convey title to submerged lands to WICO in the Second Addendum was invalid under the Public Trust Doctrine (Citizen Intervenors' Jurisdictional Statement, pp. 10-12). The Court of Appeals correctly recounted that the 1974 Act conveyed title to submerged lands in trust to the Virgin Islands Government "subject to existing rights" (Joint App. 28a). Among those "existing rights" were those of WICO which had been recently recognized in the 1973 Memorandum. After carefully reviewing the authorities, the Court of Appeals concluded that submerged lands may be conveyed in order to satisfy international obligations[19] or to further the public interest in the submerged lands[20] (Joint App. 29a-35a). In view of the circumstances of the case, the Court of Appeals found that approval of the Second Addendum in 1982 "was clearly consistent with the fiduciary obligations of the legislature" and therefore the public trust doctrine did not bar formation of a valid contract between WICO and the Government of the Virgin Islands (Joint App. 35a).

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19 *Shively v. Bowlby*, 152 U.S. 1, 47-48 (1894); *Montana v. United States*, 450 U.S. 544, 551-52 (1981), *reh'g denied*, 452 U.S. 911 (1981).

20 *See* Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471 (1970).

Close scrutiny of the implications of the result sought by the Citizen Intervenors in this case can leave no doubt that the Court of Appeals reached the correct conclusion. Sustaining the Repeal Act hardly promotes the public interest in submerged lands in St. Thomas Harbor. If the Second Addendum is declared invalid or is effectively repealed, WICO will not have 15 acres of reclaimed land which it can develop only in accordance with the exacting requirements of the Second Addendum. Instead, WICO will have a powerful claim to dredge, reclaim, and develop 42 acres in St. Thomas Harbor.[21] The District Court recognized that "[t]o adopt the intervenors' arguments in favor of . . . upholding the repeal of WICO's rights, would invite chaos" (Joint App. 82a). Given these circumstances, it is clear that the action of the Sixteenth Legislature in passing the Repeal Act in response to public pressure—not the action of the Fourteenth Legislature in ratifying the Second Addendum after careful deliberation—was "the imprudent action of a government of the day."[22]

The Citizen Intervenors are plainly grasping at straws when they argue that the Second Addendum is invalid because it improperly modified an international treaty. The Treaty accorded WICO a right to have the United States Government respect its original grant of rights from Denmark "in accordance with the terms on which they are given" (Joint App. 101a). WICO now has negotiated agreements limiting and reducing those rights with the United States Government and its successor in interest, the Virgin Islands Government. Citizen Interve-

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21 The 1968 lawsuit brought by the United States to quiet title in St. Thomas Harbor was dismissed in 1984. Because the order of dismissal under Fed.R.Civ.P. 41(b) did not specify otherwise, the dismissal "operates as an adjudication upon the merits." *See Costello v. United States*, 365 U.S. 265, 285-88 (1961). WICO may invoke the finality of the order of dismissal for the purpose of precluding the Virgin Islands Government, as successor-in-interest to the United States, from relitigating the merits of the quiet title action. *See Restatement (Second) of Judgments*, Section 43 (1982) (a judgment that determines interests in property "has preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself.").

22 *See* Citizen Intervenors' Jurisdictional Statement, p. 10.

nors' position that WICO cannot, in effect, relinquish certain rights to the Virgin Islands Government, or negotiate *to WICO's own detriment* limitations and restrictions as to the extent and exercise of those rights, is not a substantial federal question requiring further review by this Court. This argument, bordering on the frivolous, was rejected with appropriate dispatch by the Court of Appeals (Joint App. 23a-24a, n.14).

Similarly, Citizen Intervenors' contention that the Second Addendum violates the common law rule against perpetuities does not present a substantial federal question warranting review by this Court. The mere averment of a constitutional question is insufficient to afford a basis for appeal where the question presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *See Farrell v. O'Brien*, 199 U.S. 89, 100 (1905). As the District Court correctly noted in addressing Citizen Intervenors' rule against perpetuities argument,

> Title 1, Section 4 of the Virgin Islands Code states:
>
> > "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, *in the absence of local laws to the contrary.*" (emphasis added)
>
> In this instance the Memorandum of Understanding, dated October 9, 1973, was executed by the government of the Virgin Islands only after its terms had been previously approved by the Ninth Legislature of the Virgin Islands on October 30, 1972 (Act No. 3326). Likewise, a Second Addenda to the Memorandum of Understanding, dated September 22, 1981, was ratified and approved by the Fourteenth Legislature on April 7, 1982 (Act No. 4700). By its terms the second addenda has "the full force and effect of law."

> It is clear, then, that even if applicable, the Rule Against Perpetuities was modified by adoption of local laws to the contrary.

(Joint App. 46a).

The Court of Appeals considered the rule against perpetuities argument irrelevant because it viewed "the Second Addendum as definitely establishing contractual rights in WICO" (Joint App. 28a, n.17).

In light of the lower courts' manifestly correct disposition of Citizen Intervenors' rule against perpetuities argument, no substantial federal question warranting further review is presented to this Court. Appellants have had opportunities to present their rule against perpetuities argument both to the District Court and to the Court of Appeals, the issues have been fully briefed and argued, and further review would not be a productive use of the Court's time.

CONCLUSION

For the foregoing reasons, the appeals of the Citizen Intervenors and the Legislature should be dismissed, or in the alternative, the decision of the United States Court of Appeals for the Third Circuit entered March 31, 1988 should be affirmed.

Respectfully submitted,

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July 29, 1988

APPENDIX

[SEAL]

THE VIRGIN ISLANDS OF THE UNITED STATES
OFFICE OF THE GOVERNOR
CHARLOTTE AMALIE, ST. THOMAS, V. I. 00801

July 21, 1986

Honorable Derek M. Hodge
President
Sixteenth Legislature of the
Virgin Islands
Senate Building
St. Thomas, Virgin Islands 00801

Dear Mr. President:

I return without executive approval Bill No. 16-0607 "To repeal Act Nos. 3326 and 4700 pertaining to the West Indian Company, Ltd. and for other purposes".

This bill would dishonor Virgin Islands Government commitments to the West Indian Company, Ltd. (WICO) that have been entered into, after long and careful deliberation, on several previous occasions.

There is no acceptable reason for this ill-advised action on the part of the Sixteenth Legislature. Notwithstanding the apparent perception of the nine members of the Legislature who voted to repeal the WICO agreements that they were responding to substantial public opinion on the dredging issue, their action is in reality a sad betrayal of the public trust.

In the instant case the better judgment of two-thirds of the members of the Legislature has been sacrificed to the opinions of a few vocal and misguided individuals who have successfully capitalized on the re-election fears of these "community followers".

Surely this measure would not have passed had a previous Legislature not incurred the wrath of the voters by rezoning Estate Zufriedenheit. Yet how does one compare the environmental threat to Magen's Bay with a long-standing agreement

to permit the limited further development of an already heavily developed harborfront at Long Bay?

The Legislature has fallen victim to a collective mentality that is willing to undo for political expediency that which has been carefully and deliberately negotiated and made a law of this land. In 1972 a well informed Ninth Legislature decided upon a compromise solution to the very legitimate concern that some 42 acres of Long Bay not be dredged and filled for commercial purposes, by agreeing to permit the development of only 7.5 acres of the total claimed by WICO. The Ninth Legislature had been told that the development rights claimed by WICO by virtue of Article 3 of the 1917 Cession Treaty between Denmark and the United States were almost certainly legitimate and not worth the uncertainties of prolonged and expensive litigation to contest.

To put the current situation in proper perspective we must consider what Long Bay could now look like had the Governor and Legislature in 1972 decided, against the strong advice of the person then best informed on both sides of the issue (Judge Warren Young), to litigate and had then proceeded to lose that litigation. The litigation risks that were not worth taking in 1972 are even less worth taking now. Enactment of Bill No. 16-0607 would, in addition to exposing the Government and people to the possibility of full assertion of treaty rights by WICO regarding Long Bay, also likely result in claims by WICO that the Government has unconstitutionally impaired a lawful contract and deprived WICO of property without just compensation. The price tag for this venture, in event of success by WICO, would likely be several million dollars.

Let us weigh the unquestionable long term financial benefits to the local Treasury and the creation of jobs that a well planned and executed, multi-million dollar project of the kind WICO has in mind against the dubious, at best, benefits that may be realized by even a successful trip down the dangerous path now being trod by the Legislature.

Additionally, how can this Government be expected to raise desperately needed revenues without increasing taxes or reducing payroll as a last resort, if its economic development program is slowly being destroyed by some non-courageous

legislators who easily bend constantly to political public opinion pressure?

I believe common sense and reason require that this dangerous path be abandoned in favor of other election year pursuits that have less potential for economic and social disaster in our fragile community.

Sincerely yours,

/s/ JUAN LUIS

Juan Luis
Governor

DANISH EMBASSY
WASHINGTON, D.C.

The Embassy of Denmark presents its compliments to the Department of State and has the honor to convey to the Department the following statement received from the Danish Ministry for Foreign Affairs:

In the Treaty of Cession of August 4, 1916, by which Denmark ceded the islands St. Thomas, St. John and St. Croix to the United States, the United States undertook, under Article 3 (4), to "maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given: (A) The Concession granted to "Det vestindiske Kompagni" (The West Indian Company), Ltd. by the communications from the Ministry of Finance of January 18, 1913, and of April 16, 1913, relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor and preferential rights as to commercial, industrial or shipping establishments in the said harbor."

The substance of the concession granted to The West Indian Company Ltd. by the aforesaid letter of January 18, 1913, must be assessed on the basis of Danish law because the Virgin Islands were still Danish at that time. As the concession was unlimited in time, the U.S. State Department inquired, through the U.S. Embassy in Copenhagen, in August 1916, as to the period for which the West Indian Company was entitled to hold the concession. In reply, the Ministry of Foreign Affairs informed the U.S. Minister in Copenhagen on August 16, 1917, that the Company had been granted free and unlimited possession of the area, no right of pre-emption being reserved to the Government.

Under the rules of Danish law, the State holds the full ownership of Denmark's territorial waters. Hence, the Government has the right not only to sell part of the territorial waters, e.g. for damming, but also to sell part of water area for a specific use. It was, therefore, in full conformity with Danish practice that a concession was granted to the West Indian Company in 1913 in respect of the water area near Long Bay, St. Thomas, leaving the Company free to decide whether the area would be

filled in or utilized in any other way and when such filling in would be undertaken, apart from those areas which had been embanked by the Company immediately after the granting of the concession.

Danish Government authorities have generally stipulated time limits for concessions granted in respect of harbour installations and similar installations, but no such stipulation is prescribed by law, and it is not a unique case in Danish practice for a concession conferring ownership for an unlimited period to be granted like that which the West Indian Company obtained.

It may further be noted that the Danish Parliament in 1912 authorized the Government to grant a consortium the exclusive right, for a period of 99 years, to construct harbour installations in Long Bay, St. Thomas. This concession did not enter into force, but it serves to illustrate the then existing general Danish practice of granting concessions to private bodies for periods of 80-100 years.

The Danish Government feels confident that the United States will respect all the obligations following from the above mentioned Treaty of August 4, 1916.

Washington, D.C., June 25, 1970

[SEAL]

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

Civil No. 337-1968

UNITED STATES OF AMERICA,

Plaintiff

—vs—

WEST INDIAN COMPANY, LTD.,

Defendant

ORDER

A Memorandum of Understanding, dated October 3, 1973, and signed by all the parties to the above litigation, has been brought to the Court's attention.

WHEREAS, the above Memorandum obligates the West Indian Company, Ltd. to make certain landfills in St. Thomas harbor, which landfills may require a year and a half or more; and

WHEREAS, disagreements may arise as to the satisfactory performance of the above conditions, or of other conditions included in the Memorandum,

It is hereby ORDERED:

1. That the cause be continued *sine die* until in the Court's judgment the affirmative obligations of the parties under the Agreement are performed; and

2. That all parties report to the Court at 90 day intervals as to the progress of the performance of conditions, the first report to be submitted March 1, 1974.

Dated at Christiansted, St. Croix,
this 27th day of December, 1973.

ENTER:

/s/ WARREN H. YOUNG
Warren H. Young
Judge

January 19, 1980

MEMORANDUM

TO: Commissioner Darlan Brin

FROM: I. M. Heyman

SUBJECT: A Suggested Means for Proceeding Towards Settlement of the WICO Claim

For the reasons stated in the Preliminary Report of January 7, 1980 analyzing legal issues presented by WICO, I believe that it would be in the interest of the Government of the Virgin Islands to settle the outstanding dispute. My sense is that those in the Executive Branch, who know the history of the dispute, view WICO's latest offer as generally reasonable. It demands vastly less submerged land than arguably was due WICO under the Treaty and considerably less than confirmed to WICO under the Memorandum of Agreement, which I believe is enforcable against V.I.

There are three problems, however, that have to be addressed if a satisfactory settlement is to be effectuated:

(1) Settlement requires amendments to the CZMA. This, in turn, requires a recommendation by the Coastal Zone Management Commission and action by the Legislature. This means that the Executive Branch must convince these bodies and the public that the proposed settlement is sensible. This is going to take considerable education of people unfamiliar with the background.

(2) WICO, in its proferred Addendum, offers some restrictions on uses on reclaimed land, but so far has not indicated with any precision how these might be arranged or how development would be sited or designed on the reclaimed areas. Greater precision is required at this time: (a) to draft use and development limitations in the Memorandum and (b) to inform the Commission, the Legislature, and the Public of what is being approved by the settlement.

(3) WICO wishes to avoid the need for obtaining a coastal zone permit before going ahead with development on reclaimed lands. This is probably unwise; rather, it would seem sensible from the V.I.'s viewpoint to require a final permit to allow "fine tuning" with respect to sitting, design, access roads, landscaping, and the like.

To address the foregoing, I propose:

A) That Commissioner Brin should be authorize to negotiate with WICO the Second Addendum to the Memorandum. His lawyer should be the A.G. and what is agreed to should reflect the positions of the Commissioner, the A. G. and the Governor's Office.

B) The Second Addendum should provide that it becomes effective upon the passage of the necessary amendment to the CZMA; or in the alternative, it should provide that the Governor will use his best efforts to have the necessary amendment adopted, but that such adoption within a stated time limit, is a condition precedent to the V. I.'s obligation to perform.

C) When there is a consensus between the Executive Branch (the Governor's Office, the A.G., and the Commissioner) and WICO on the provisions of the Second Addendum, the necessary amendment to CZMA should be proposed by the Governor and sent for a hearing before and recommendations by, the Coastal Zone Management Commission. At such a hearing, Commissioner Brin should review in detail the history of the WICO dispute, emphasizing the extent to which the efforts of the V.I. Government have reduced the extent of the areas to be reclaimed as well as the extensive areas vulnerable to reclamation (or the potential money damages) should the agreement not be realized and should WICO prevail in a litigation.

D) After recommendatory action by the CZM Commission, the Bill amending the CZMA should go to the Legislature for action. One problem that should be foreseen is that some people might urge exercise of eminent domain powers to acquire whatever are WICO's rights. The A.G. will have to be in a position to estimate the probable cost to the V.I. of such an alterna-

tive. This will be a difficult estimate given the legal uncertainties, especially involving exercise of the police power, explored in the Preliminary Report of January 7, 1980.

COASTAL ZONE PERMIT NO. CZT-89-83W

1. *AUTHORITY.* This permit is issued by the Coastal Zone Management Commission (hereinafter "The Commission") on behalf of the Department of Conservation and Cultural Affairs of the Government of the Virgin Islands pursuant to Title 12, Chapter 21, Virgin Islands Code and Act 4700. As herein, "Permittor" is the Government of the Virgin Islands and "Permittee" is The West Indian Company, Ltd. (WICO).

2. *SCOPE.* To dredge approximately 134,000 cubic yards from an area approximately 26 acres in size in Outer Long Bay. The spoils will be dewatered on fastland and then used as fill material to fill approximately 7.5 acres of submerged lands seaward of Long Bay. The filled area will be protected on the seaward side by rock and gravel armour. The area to be dredged and filled are the areas agreed to in the Second Addendum to Memorandum of Understanding dated as of the 3rd Day of October, 1973. The area to be filled is seaward of Parcels No. 4, 5 & 5A Estate Thomas, St. Thomas, V.I.

3. *TERM.* This permit is effective upon its approval by the St. Thomas Committee of the Coastal Zone Management Commission. The Governor and the Legislature of the Virgin Islands have approved and ratified the activities authorized by the permit in Act 4700, duly adopted by the Fourteenth Legislature and signed into law by the Governor, as confirmed by the annexed Memorandum Opinion of the Attorney General dated June 22, 1984. Authorization for construction under this permit shall expire if the permittee fails to conform to the time limits in the Second Addendum to the Memorandum of Understanding dated as of the 3rd day of October, 1973 among the Government of the Virgin Islands, the West Indian Company, Ltd., and others (hereinafter "Second Addendum to Memorandum of Understanding").

4. *DOCUMENTS INCORPORATED BY REFERENCE.*

EXHIBIT A. Application Form
B. Application Letter
C. Project Drawings

D. Environmental Assessment Report
E. Second Addendum to Memorandum of Understanding dated as of the 3rd day of October, 1973.

5. *GENERAL CONDITIONS.*

(a) *Liability.* The Permittee agrees to assume full and complete responsibility for all liability to any person or persons, including employees, as a result of its control of the area described in Paragraph 2 of this permit and all improvements thereon (which area and improvements are hereinafter referred to as "the premises"), and to hold the Permittor free and harmless from civil or other liability of any kind during the time the Permittee is in control of the premises pursuant to this permit.

(b) *Personal Property and Damage.* All personal property of any kind or description whatsoever located on the premises shall be there at the Permittee's sole risk.

(c) *Assignment or Transfer.* This permit may not be transferred or assigned except as provided in Section 910-15 of the Regulations of the Coastal Zone Management Act, or as provided in the Second Addendum to Memorandum of Understanding.

(d) *Permit to be Displayed.* A placard evidencing the permit shall be posted in a conspicuous place at the project site during the entire period of work.

(e) *Reliance on Information and Date.* The Permittee affirms that the information and data which it provided in connection with its permit application is true and accurate, and acknowledges that, if subsequent to the effective date of this permit such information and data proves to be false or inaccurate, the permit may be modified, suspended or revoked in whole or in part, and that the Commissioner may, in addition, institute appropriate legal action.

(f) *Development to be Commenced.* Any and all developments approved by this Coastal Zone Permit shall be commenced and completed in accordance with the Second Addendum to Memorandum of Understanding.

(g) *Notification of Completion.* Upon completion of any activity authorized or required by this Coastal Zone Permit, the Permittee shall promptly so notify the Director of the Division of Coastal Zone Management ("The Director") and, where the services of a professional engineer were required in undertaking the activity, a certification of compliance provided by the project engineer that the plans and specifications of the project and all applicable Virgin Islands Code requirements have been met, shall be filed with the Director.

(h) *Inspection.* The Commission, its Committee, the Commissioner or their authorized agents or representatives shall have the power to enter at reasonable times upon any lands or waters in the coastal zone for which this Coastal Zone Permit has been issued. The Permittee shall permit such entry for the purpose of inspecting and ascertaining compliance with the terms and conditions of said Coastal Zone Permit. The Permittee shall provide access to such records as the Commission, its Committee, or the Commissioner in the performance of its or his duties under the Act may require the Permittee to maintain. Such records may be examined and copies shall be submitted to the Commission, its Committee or the Commissioner upon request.

(i) *Conditions of Premises.* The development authorized by this permit shall be maintained in a safe, attractive and satisfactory condition and in accordance with the description, plans or drawings approved by the Commissioner, pursuant to the Second Addendum to Memorandum of Understanding.

(j) *Public Access to Shoreline.* The development shall be operated so as to assure optimum public access to the shoreline.

(k) *Notices.* All notices sent or required to be sent hereunder must be by certified mail, return receipt requested. If addressed to the Permittor, same shall be sent to the Commissioner of Conservation and Cultural Affairs, Government of the Virgin Islands, Post Office Box 4340, St. Thomas, U.S. Virgin Islands 00801, or to such other place as the Permittor may hereinafter designate by certified mail. If addressed to the Permittee, same shall be sent to Mr. Hans Jahn, President, The West Indian Company, Ltd., Box 7760, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00801, or to such other place as the Permittee may hereinafter designate by certified receipt requested.

(l) *Nonwaiver.* One or more waivers by the Permittor of any covenant or condition of this Permit shall not be construed as a waiver of a further breach of the covenant or condition, and the consent or approval of the Permittor to or of any acts by the Permittee requiring the Permittor's consent or approval shall not be construed as approval of any subsequent similar act by the Permittee.

(m) *Revocation.* It is specifically understood that all the foregoing covenants and agreements, as well as other terms and special conditions hereby agreed to by Permittee, are to be well and faithfully kept by Permittee and that any material failure by Permittee to keep same, will result in revocation of this permit provided, however, that Permittee shall first have been given notice of any such breach and shall have been afforded a reasonable opportunity to cure.

(n) *Other Approval.* If the development covered under this permit requires separate and distinct approval from the United States Government or any agency,

department, commission or bureau thereof, then no development is allowed under this permit until such permits or approvals have been obtained.

6. *SPECIAL CONDITIONS.*

1. The West Indian Company, prior to undertaking the development, shall submit to the Division of Coastal Zone Management a detailed drainage plan along with detailed information establishing the sufficiency of the plan to accommodate a 100 year storm.

2. That the West Indian Company undertake the filling of the submerged lands from the eastern most section and proceed seaward, hence westward, forming an embayment. The seaward dike shall be at least 70 feet wide and be maintained at least 100 feet in front of the filling in the embayment, subject to any deviations or adjustments necessary to accommodate the right of election of Yacht Haven Hotel to limit or decline fill in areas allocated to it by the Second Addendum to Memorandum of Understanding.

3. Once the seaward dike is established, armour shall be installed promptly.

4. The Permittee shall install and maintain turbidity curtains seaward of the filling operations.

IN TESTIMONY WHEREOF, the parties herein have hereunto set their hands and seals on the days and years appearing herein below.

GOVERNMENT OF THE VIRGIN ISLANDS
Permittor

/s/ [illegible] Acting Chairman 12/18/84
St. Thomas Committee of the
Coastal Zone Management Commission
By: Commission Member

THE WEST INDIAN COMPANY, LTD.
Permittee

[SEAL]

/s/ HANS F. JAHN		11/19-84
Permittee	Hans F. Jahn, President	Date

I, LOUIS GREAUX, do hereby certify that I am the Secretary of the THE WEST INDIAN COMPANY LIMITED, a corporation that Hans F. Jahn, who signed this permit is President of said corporation that he was authorized by its Board of Directors to execute this permit in the name of and in behalf of said corporation. I further certify that the making of this permit is within the scope of the corporation's powers.

/s/ LOUIS GREAUX
Secretary
Louis Greaux

SWORN TO AND SUBSCRIBED
before me this 19th day
of November, 1984.

/s/ JUDITH A. KNAPE
Notary Public

THE WEST INDIAN COMPANY, LTD.
Permittee

[SEAL]

/s/ HANS F. JAHN		11/19-84
Permittee	Hans F. Jahn, President	Date

I, LOUIS GREAUX, do hereby certify that I am the Secretary of the THE WEST INDIAN COMPANY LIMITED, a corporation that Hans F. Jahn, who signed this permit is President of said corporation that he was authorized by its Board of Directors to execute this permit in the name of and in behalf of said corporation. I further certify that the making of this permit is within the scope of the corporation's powers.

/s/ LOUIS GREAUX
Secretary
Louis Greaux

SWORN TO AND SUBSCRIBED
before me this 19th day
of November, 1984.

/s/ JUDITH A. KNAPE
Notary Public

[SEAL]

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

Department of Conservation and Cultural Affairs

P.O. BOX 4340
CHARLOTTE AMALIE, ST. THOMAS, V.I. 00801

February 9, 1984

Maria Takenson Hodge, P.C.
Attorney At Law
Post Office Box 4511
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00801

Dear Attorney Hodge:

After reviewing your proposed language for Coastal Zone Management Permit No. CZT-89-83W with members of the Coastal Zone Division Staff, we came to the conclusion that most of it is acceptable, but some had to be discarded; and in some instances, we had to replace some language which was deleted by y r draft.

More important, however, is that I could not, under the circumstances, find a legal justification for by-passing the signatures of the Governor, the President of the Legislature or the Chairman of the Committee on Conservation and Cultural Affairs when the Legislature is not in session on this major permit.

I realize that the Legislature passed Act No. 4700 (Bill No. 14-0664) and it was signed into law by the Governor, but the permitting process and its requirements which are consistent with Act No. 4700 must be approved by the Legislature and the Governor for all major permits.

We stand ready to cooperate in any way that we can in order to facilitate the process. I remain,

Sincerely yours,

/s/ WILEY J. HUFF
Wiley J. Huff
Counsel, DCCA

[SEAL]

JAMES S. WISBY
Counsel to the Governor

THE VIRGIN ISLANDS OF THE UNITED STATES
OFFICE OF THE GOVERNOR
P.O. BOX 599
CHARLOTTE AMALIE, ST. THOMAS
(809) 774-0001

March 28, 1984

MEMORANDUM

To: Governor of the Virgin Islands

From: Counsel to the Governor

Re: CZM permit application/West Indian Company dredge and fill project

This memorandum will address the question of whether the West Indian Company, Ltd., (WICO) is required by law to obtain a coastal zone management permit, approved by the Governor and ratified by the Legislature, in order to dredge 134,000 cubic yards of sand from the St. Thomas harbor to fill 7.5 acres of submerged land at the head of Long Bay.

Background

As briefly as possible, the Government (GVI) entered into a Memorandum of Understanding with WICO on October 3, 1973, confirming certain harbor rights reserved to WICO by treaty between the United States and Denmark ratified in 1917. An addendum was adopted to the Memorandum on October 26, 1975. The CZM law was enacted via Act No. 4248, effective October 31, 1978. WICO construed the new Act as violative of the 1973 Memorandum of Understanding, as amended; the GVI disagreed. To settle the matter a Second Addendum, signed by the Governor, was executed on September 22, 1981, and was subsequently incorporated into and made a part of Act

No. 4700, effective April 7, 1982. The Second Addendum contained, among other things, compromises in both WICO's and GVI's positions regarding the extent of harbor alteration rights conferred on WICO by treaty and the extent of control exercisable by GVI over WICO's rights. In order to provide a vehicle by which the GVI could certify to the U.S. Army Corps of Engineers that all local permits had been issued (a requirement of Paragraph 12(c) of the Second Addendum), WICO applied for a coastal zone permit for the contemplated dredge and fill project.

Summary of Law

Section 1 of Act No 4700 amended § 905(i) of the CZM law (Title 12) to state, in pertinent part, that nothing contained in the CZM law could be construed to alter, limit, diminish, impair or interfere with any treaty right, grant or concession which was vested in WICO prior to enactment of the CZM law and recognized by statute as binding on the GVI, subject to any memorandum of understanding pertaining to such right, grant or concession which has been ratified by law.

Section 2 of Act No. 4700 states, in pertinent part, that the Agreement embodying the aforementioned Second Addendum to the Memorandum of Understanding is hereby ratified with the full force and effect of law, and the Governor and all departments and instrumentalities of government are directed, within the scope of their jurisdictions, to execute the terms of that Agreement.

DCCA'S Postion

DCCA's position, as explained by its counsel, Wiley Huff, is that, since the project contemplated by WICO includes occupancy or development of filled lands, § 911 of the CZM law requires approval of the permit by the Governor and ratification of the permit by the Legislature, notwithstanding Act No. 4700 and its incorporated addendum agreement.

WICO's Position

WICO's position, as explained by its counsel, Maria T. Hodge, is that the Second Addendum was negotiated, executed and incorporated into law as an exception to and substitute for the CZM law as it pertains to subject matter specifically treated therein. She supports this position by citing the provisions of paragraph 12(b) of the Second Addendum which state:

> "(b) *IMPACT OF VIRGIN ISLANDS COASTAL ZONE MANAGEMENT ACT*
>
> The Specific provisions of this Agreement shall govern as to WICO's right to reclaim and to acquire title to reclaimed areas and to develop, and as to permitted uses, height restriction, usable open space and parking which shall not be matters of discretion, *but as to any matters not specifically covered by the Agreement, such as utilities, siting, performance standards, design and landscape, WICO shall be subject to the requirement of a Coastal Zone Management permit in accordance with the provisions of the Virgin Islands Coastal Zone Management Act and the goals* and *policies of the Virgin Islands Coastal Zone Management* Act." Emphasis supplied.

WICO's counsel also notes that the Second Addendum was necessitated in the first place because of the complete unacceptability (to WICO) of the contents of § 911(d) (2) of the CZM Act, limiting occupancy of developed, filled land to a 20 year, nonrenewable lease period. It is presumably DCCA's position that this 20 year lease provision also applies to WICO, since it is the same § 911 that imposes the requirement of gubernatorial approval and legislative ratification.

My Opinion

The CZM Act obviously did not originally contemplate accommodation of WICO's treaty rights to fill and develop submerged land, even though the GVI-WICO Memorandum of Understanding had been in existence for 5 years prior to its enactment. It was this oversight that led to execution of the Second Addendum and enactment of Act No. 4700.

It has become clear to me, after reading the Second Addendum, Act No. 4700 and the CZM Act, that the Legislature did not intend to place two potentially fatal stumbling blocks in WICO's path when it ratified and made law the Second Addendum; but that is exactly what DCCA would be doing by requiring that a Coastal Zone Permit be approved by the Governor and ratified by the Legislature before the permit could be effective and the project it describes undertaken. The Governor and the Legislature possess powers granted by the CZM Act to deny permits by refusal to approve and ratify, respectively, and to thereby effectively prohibit any undertaking described in the permit application. If DCCA is correct in its position, then the reason for enactment of Act No. 4700 is not altogether clear.

Possible Remedies

A. The remedy I prefer would entail issuance of a CZM permit to WICO for the described dredge and fill project, accompanied by a copy of Act No. 4700, certified as to authenticity by the Lieutenant Governor, as well as a joint statement signed by the Commissioner of Conservation and Cultural Affairs and the Chairman of the CZM Commission to the effect that enactment of Act No. 4700, with the subject Second Addendum incorporated therein, constitutes approval by the Governor and ratification by the Legislature of the project described in the permit. This remedy would provide the vehicle, a CZM permit, through which the Government (represented by DCCA) could exercise the monitoring, supervising and decision-making authority contemplated for it by the Second Addendum, yet eliminate the potential for outright prohibition of the project represented by DCCA's current position.

B. A less satisfactory remedy would entail cancellation by WICO of its CZM permit application and the seeking of a statement from the Government that the Second Addendum does not contemplate that one be obtained. The Second Addendum would then govern the dredge and fill activity but would not provide the opportunity for specificity in expressing GVI requirements that would exist with a CZM permit. Additionally, the CZM permit has already been applied for and the GVI

possesses, in my opinion, the flexibility to process and grant the permit application in context of Act No. 4700.

Respectfully submitted,

/s/ JAMES S. WISBY

James S. Wisby

The Legislature of the Virgin Islands
Charlotte Amalie, St. Thomas
Virgin Islands
00801

P.O. Box 477

Office of the Legislative Counsel

April 13, 1984

Mr. James Wisby
Counsel to the Governor
Office of the Governor
St. Thomas, VI 00801

Dear Attorney Wisby:

This is in response to your request that I review and comment on your March 28, 1984 memorandum to the Governor relating to the "CZM permit application-West Indian Company dredge and fill project".

I opine that the West Indian Co. does not need to go through the normal process of obtaining a CZM permit to dredge the harbor, that is, the procedures entailed in Title 12, Virgin Islands Code.

My reading of the treaty between Denmark and the United States, dated August 4, 1916, states in part:

> "Article 3.
>
> It is especially agreed, however, that: . . . (4) the United States will maintain the following grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they are given:
>
> (a) the concession granted to the West Indian Company, Ltd. by the communications from the Ministry of Finance of January 18, 1913 and of April 16, 1913 relative to a license to embank, drain, deepen and utilize

certain areas in St. Thomas Harbor and preferential rights as to commercial, industrial or shipping establishments in the said Harbor."

It is apparent that dredging of St. Thomas Harbor was a specific concession granted to the West Indian Company through Article 3 of the treaty between Denmark and the United States and must be honored unless abrogated by the United States Government. Additionally, Act No. 4700 (Bill No. 14-0664), approved April 7, 1982, clarified the question pertaining to dredging permits for the West Indian Co. That Act amended Title 12, Section 905, subsection (i), Virgin Islands Code, by adding a new paragraph (5) to read as follows:

"(5) any treaty right, grant or concession which was vested in any party prior to the date of enactment of this Chapter and which in whole or in part has been expressly recognized by statute, court order or lawfully executed agreement binding on the Government of the Virgin Islands, whether such recognition precedes or succeeds the date of enactment of this Chapter, and subject to any agreements or memorandums of understanding pertaining to such right, grant or concession which have been or may hereafter be ratified by law."

Thus, between the treaty which ceded the Virgin Islands from Denmark to the United States and Act No. 4700, WICO could be issued a CZM permit for the dredge and fill activity as requested by them.

In summary, the treaty of August 4, 1916 and Act No. 4700 leave us with little choice to do otherwise.

Sincerely,

/s/ ERIC E. DAWSON
Eric E. Dawson
Chief Legal Counsel

cc: All Senators
Legal Staff

OFFICE OF THE ATTORNEY GENERAL
OF THE UNITED STATES
VIRGIN ISLANDS

[LETTERHEAD]

June 22, 1984

TO: James S. Wisby, Esq.
Counsel to the Governor
Edwin Hatchette, Chairman
Coastal Zone Management
Committee, St. Thomas

SUBJECT: Memorandum of Agreement: Government of the Virgin Islands and the West Indian Company, Limited

MEMORANDUM OPINION OF THE
ATTORNEY GENERAL

It is the opinion of the Attorney General that Act No. 4700, approved April 7, 1982, fully ratified the terms and conditions of " 'The Second Addendum to Memorandum of Understanding dated as of the 3rd day of October, 1973' dated the 22 day of September 1981".

To the extent that Act 4700 varies the CZM Act (T. 12, Chapter 21), the provisions of Act 4700 supersedes the CZM Act.

It is further the opinion of the Attorney General that Act 4700 fully satisfies the requirement for Legislative and Executive approval of any CZM Permit issued in accordance with the Memorandum of Understanding and addendum thereto and consistent with the provisions of Act 4700.

DATED: June 22, 1984

/s/ J'ADA M. FINCH-SHEEN
J'Ada M. Finch-Sheen
Attorney General

Application No.	84F-2218
Name of Applicant	THE WEST INDIAN COMPANY, LTD. (WICO)
Effective Date	FEB. 14, 1985
Expiration Date (*If applicable*)	FEB. 14, 1990

DEPARTMENT OF THE ARMY
PERMIT

Referring to written request dated March 9, 1983 for a permit to:

(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (*33 U.S.C. 403*);

(X) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (*33 U.S.C. 1344*);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (*86 Stat. 10652; P.L. 92-532*);

The West Indian Company, Ltd.
Post Office Box 7660
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00801

is hereby authorized by the Secretary of the Army:

to place fill over an area of about 7.5 acres, obtained by the dredging of a borrow area of about 26 acres

in the Long Bay portion of the St. Thomas Harbor

at latitude 13°20′20″, longitude 64°5′20″, Long Bay Road, Charlotte Amalie, St. Thomas, U.S. Virgin Islands

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (*on drawings, give file number or other definite identification marks.*)

labeled "84F-2218", in five sheets revised July 20, 1984

subject to the following conditions:

I. *General Conditions*:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (*33 U.S.C. 1344*), the Marine Protection, Research and Sanctuaries Act of 1972 (*P.L. 92-532, 86 Stat. 1062*), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (*including dredged or fill material*), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in

such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before _____ day of _____, 19____, (*three years from the date of issuance of this permit unless otherwise specified*) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsi-

bility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferree subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. *Special Conditions*: (*Here list conditions relating specifically to the proposed structure or work authorized by this permit*):

a. A Department of the Army permit application shall be submitted for review prior to the construction of the proposed marina, subject to the terms and conditions of the Second Addendum dated 22nd day of September, 1981, to Memorandum of Understanding dated the 3rd of October, 1973, among the West Indian Company Limited, the Government of the Virgin Islands and others, as ratified and enacted into law by Virgin Islands Act No. 4700 approved April 7, 1982.

b. Exploratory underwater archeological investigations and a magnetometer study shall be performed and the results coordinated with the Department of Conservation and Cultural

Affairs (DCCA) and with the Virgin Islands Planning Office, Division for Archeology and Historic Preservation, prior to construction.

c. Should significant cultural material be found, the West Indian Company shall permit the DCCA to conduct a salvage recovery operation to rescue such material.

d. The final plans for the proposed development over the filled area shall be submitted to the DCCA for final approval, subject to the terms and conditions of the Second Addendum dated 22nd day of September, 1981, to Memorandum of Understanding dated the 3rd of October, 1973, among the West Indian Company, Limited, the Government of the Virgin Islands and others, as ratified and enacted into law by Virgin Islands Act No. 4700 approved April 7, 1982.

e. The riprap revetment shall be sloped down to an adequate grade to avoid wave reflection.

The following Special Conditions will be applicable when appropriate:

STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

MAINTENANCE DREDGING:

a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for _____ years from the date of issuance of this permit (*ten years unless otherwise indicated*);

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;

b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATERS:

a. That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

THE WEST INDIAN COMPANY LIMITED

/s/ HANS F. JAHN	February 6, 1985
Hans F. Jahn Permittee President	Date

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

/s/ CHARLES T. MYERS III	Feb. 14, 1985
Charles T. Myers III, Colonel, Corps of Engineers	Date

DISTRICT ENGINEER,
U.S. ARMY CORPS OF ENGINEERS

Transferee hereby agrees to comply with the terms and conditions of this permit.

Transferee	Date

[9] Q And, did you incur expenses in retaining those experts to help you prepare those exact statements and the applications?

A Yes, we did.

Q What kind of expense did you incur for that?

A Well, if you take it from April 1982, when we started to go into all these things and up to the end of June, we incurred altogether about $400,000 in expenses. That includes the environmental experts, the engineers, but also the legal expenses, but also the archaeological survey which we were required to make as per the Army Corps of Engineers.

Q What kind of a survey was that?

A It was a survey of the area which we are now dredging to find out if there were any artifacts, et cetera, which had to be checked before we could start dredging.

Q Was that an underwater survey?

A That was an underwater survey, an electronic survey.

Q And what was the result of that?

A The results was that they didn't find anything. And, that survey in itself cost $72,000.

Q Did there come a time that you secured all the necessary permits to go ahead with your dredge and fill operation?

* * *

SIXTEENTH LEGISLATURE OF THE VIRGIN ISLANDS

REGULAR SESSION

JULY 9, 1986

PART I

CHARLOTTE AMALIE,
ST. THOMAS, VIRGIN ISLANDS

BEFORE:

Senator Derek M. Hodge

APPEARANCES:

Senator John A. Bell
Senator Lorraine L. Berry
Senator Virdin C. Brown
Senator Adelbert M. Bryan
Senator Hector L. Cintron
Senator Clement Magras
Senator Cleone Creque Maynard
Senator James A. O'Bryan, Jr.
Senator Lilliana Belardo de O'Neal
Senator Holland Redfield, II
Senator Ruby M. Rouss
Senato Allan Paul Shatkin
Senator Iver A. Stridiron

Gregory Lewis
Chief Recording Secretary

[45] * * *

SENATOR HODGE: Senator Bryan.

MR. COLE: Senator Bryan, two minutes. Senator Bell, three minutes—sorry—five minutes.

SENATOR BELL: Thank you.

SENATOR BRYAN: Mr. President, what we have here is not whether some land in Anna's Hope is to be transferred. There's a distinct and separate difference between land out in Mafolie, or Anna's Hope or down main street or King Street or in Strand Street, as opposed to submerged land. We have to get clear on that; submerge land is trust territory; nobody, this government, this legislature, the judge cannot give away trust land. This is the argument that I'm saying; whether Senator Rouss deeded piece of her land with a next half or another person to get a driveway. That's a different situation, that's land in—land that's not submerged land. Now, the contract or the concession between The West Indian Company, if it was obtained without legal authority by the Finance Ministry of Denmark, to grant that concession; the law is clear, nobody, no government, no branch can deed away or give away or sell submerged or trust [46] land. That's the argument. So, if The West Indian Company obtained these lands through misrepresentation or misinformation, as such, we can repeal contracts, we can repeal those things. The important thing is that since 1972 and up to 1982, even though they had had a contract signed by Governor Evans and Governor King in 1975 and 1978; they took until 1982 to rush to the Fourteenth Legislature to ratify that agreement; and it was ratified without the legal right and authority to do so. The legislature was—the First, the Sixth or the Thirteenth, or the Seventeenth or Twentieth, has no legal authority to sell or transfer trust land. That is the argument. So, we are clear on that. I don't want us to relating land in Anna's Hope, or land in Wintberg. I'm saying trust land is trust land; we need to get cleared on that. Again, the argument and the record are here; I don't have the time, because we was afforded only ten minutes. Nonetheless, Mr. President, the best interest of the people of the Virgin Islands; just like we repeal the no fault, we repealed Cane Bay, we repealed the South Shore situation for the doctors in St. Croix. This body repealed many actions that were

taken by previous legislatures. I'm saying, what is so special with West Indian Company? West Indian Company has not done anything to the Virgin Islands other than employ some people; and take their millions of dollars that they made in the Virgin **[47]** Islands and ship it outside of the Virgin Islands. Mr. Jahn sat right there and told us that the shareholder is a Hildeberg corporation. There's noplace in the Virgin Islands name Hildeberg. Hildeberg is in Germany. I lived there. How could a company in Yugoslavia and Hildeberg establish in New York—

MR. COLE: Time.

SENATOR BRYAN: —and say that they own these lands—these land belong to the people of the Virgin Islands. We are going to take it back, even if we have to go—I am not accepting their excuse there's a contract. There's no contract. I want the land back; it's ours.

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SENATOR BROWN: —an offer to the federal government to settle. The federal government said, let's see what the Virgin Islands Government wants to do and, you know, what the people of the Virgin Islands—the people, not the elected representatives, but the people said we don't want anything to do with an agreement that gives away our rights in this harbor to West Indian Company. The people said it, they don't want them to dredge and fill Frederik Point in Long Bay in 1971 and time after that. But what happened, the people who were elected to represent the people of this territory did not follow the wishes of the people of this territory at that time, particularly St. Thomas. When the vote was counted in October, I guess, it was of 1972, only four people voted against the proposed settlement. And it was from then that we saw things tarted to go downhill. Mr. President, this issue is one in which we have no other choice, but to deal with it one way or the other. But we must deal with it. We must, as Senator Redfield say, roll the dice and see what come out. No matter what we do, it's going to end up in **[61]** court. I have another alternative that I will offer at a later time, but I am voting for the repeal. We have to take the steps to assert the right of the people of this territory. As

Senator Bryan pointed out, the submerge and fill lands were turned over to the government in trust for the benefit and use of the people of this territory and, yet, day after day we see it being given away, or let slip away out of the hands of the government and out of the hands of the people; and that is no difference. Do we let anybody who want to come in and obstruct the navicable waters? No, we don't, we don't allow that; and we are not talking about just simply asserting the right of police power, because it doesn't stop West Indian Company from owning or claiming title; it doesn't contest that. It asserts one authority, and I am going to support that, too. What we are talking about are rights, title and ownership. It is this government that should have the right and title, and if we want to let West Indian Company dredge and fill, we let them do it at our discretion, on our land. And it should be noted that The West Indian Company is not the only party here that's involved, who will be getting land that would be created here; not The West Indian Company and the government along; but there are at least three other parties; Yacht Haven included. I mean, if you look back on what has happened in recent months; I begin to think that, maybe there may have been **[62]** another deal cooking between Yacht Haven and West Indian Company even before this matter got this far, before they even got a dredge out there or put out any notices for it; because Yacht Haven made sure—I mean, they are urgently pushing to get a renegotiated agreement on their submerged land permit, to be substituted for a coastal zone permit—

MR. COLE: Time.

SENATOR BROWN:—if I might finish the thought? And they got it in the Fifteenth Legislature and, subsequent to that, in this legisalture they pushed to get a buoy line established off of their yachts. Mr. President, there's something rotten in Denmark in this agreement and, I think that we need to clar it up. Thank you.

SENATOR HODGE: Is there any other senator? Senator O'Bryan.

SENATOR O'BRYAN, JR.: Good morning, Mr. President, fellow colleagues.

Mr. President, in the life of any society in any civilization, there's always a time when an issue has found its time. I have said before and I will say again, my concern relatieve to West Indian Company claim goes back to the basic treaty. I basically, categorically reject the right of any foreign entity to maintain control over the submerged land of this territory for seventy-three years. **[63]** Let's face it, when the treaty for the sale of the Virgin Islands was consummated, the world was very different then, colonialism was still in its ranking form; United States was headed toward ward, desperately needing the harbor of the Virgin Islands to protect the Panama Canal, and attempting to—provided it was taken over by the German occupation in World War I, to, of course, have claim to St. Thomas harbor, so any deal that was made that served—

SENATOR HODGE: Just a minute, Senator O'Bryan.

SENATOR O'BRYAN, JR.:—however, since that time the world drastically changed, colonialism is now in retreat across the world; even more so—even the United States has relinquish its claim to the Panama Canal. Great Britain relinquishing its claim to Hongkong. And, so, years later, the vestige of what was the Danish rule still is holding on in the harbor of Charlotte Amalie. I reject that view. I think we, as a society—each of us being trusties of the public will—must for a period of time make some major decision as to what we want the future of the Virgin Islands to be. I do not subscribe to the issue of an agreement being an agreement. The agreement we talk about is an agreement that is vestiged with colonialism and its root cause. And I say there's an inherent right of our people—of a free people, to alter and to basically dominate and to change and to mold where-**[64]**ever our future may lead us. Certainly, I recognize that the issues do not necessarily legally sound, because we do have an agreement, but an agreement based on what in many of the cases why colonialism has gone into retreat. The previous colonial ruler still has some kind of responsibility to its former colleagues. Does Denmark have any claim to the Virgin Islands? When was the last time we received one dime from the Danish government? America, like it or not, cuse it or not, defend it or not; has been the one who has burdened with the burden of responsibility for the Virgin Islands since 1917; and

the Danish has not looked back. And, now, after all, they claim this treaty and they have rights to our harbor; and in the name of the treaty that they themselves were so glad to get out off. No. My conscience says that I have a responsibility to vote for it and in good faith. I think that the submerged land of this territory belong to the people—those of us who in 1986 live here, work here, raise their children here and will die here. And I refuse to believe that this treaty can bind us forever; for nothing lasts forever. And we, as a free people, have the inherent right to guide our own destiny. And if there is a law—I believe like Martin Luther King, that there is a higher law—the law of a free people to determin their destiny. So, my conscience will be clear. I have no reservations about voting "yes" on this bill; [65] I know its ramifications, but, I think, in the long and short of it—

MR. COLE: Time.

SENATOR O'BRYAN, JR.:—we are now on an issue whose time has come. And I have no doubt that I will sleep very good tonight after voting "yes". Thank you, very much.

SENATOR HODGE: Senator Magras.

SENATOR MAGRAS: Thank you, Mr. President.

Mr. President, we have heard quite extensively the history of this treaty, but there is one other quotation that I would like to have; it's taken from a book entitled 'The Purchase of the Danish West Indies', printed in 1932. In his reply of July 26, 1916, Mr. Muck (phonetics) the noted former secretary; and I quote: "Am most anxious that treaty should be signed at once, without waiting to examine original documents relating to concessions or attempting to modify provisions in regard to special rights of Danish subjects. He thinks that you should meet their representative at once in New York and close the matter, otherwise it may fail". There is no country, Denmark, the United States nor the Virgin Islands that allow any individual or corporation to own submerged land. So, how in God's name could a piece of [66] legislation like this—that stand before us now, that says that this will, and our rights to submerged land be upheld in any court of competent jurisdiction, including the world court. There's no court that will uphold that. Judge Young in his preliminary evaluation recommended settlement. But, more

importantly, he recommended further study of this subject. That was what Judge Young recommended. Public lands, submerged lands which were to be held in trust by the government that have been ceded to a foreign entity, a foreign corporation; because regardless of the fact that this company was registered here in the Virgin Islands; it's owners are of foreign origin. And I say to my fellow legislators here today, that no one is infallible, not even those former legislators who voted on Act 4700 or any previous piece of legislation relating to this matter. You still have the right to change your mind. You may have been misled. And the lines of collusion in previous administrations have been clearly drawn. We know who the parties were to the negotiations, and there is no doubt that there was collusion involved in the original settlement—

SENATOR ROUSS: Collusion with who?

SENATOR MAGRAS: —we cannot, as legislators, abdicate our legal right to police these islands. We cannot give up our police powers to any corporation. A major **[67]** concern here is not the development of Long Bay, but, rather, the failure or refusal of WICO to disclose to us what they intend to put on that piece of land that they are creating out there. And I say to you, that I have learned from sources that part of their intention is to bunker fuel on that site. If we have not learned from our experience with the oil spill that we had recently if we had not learned that, that could mean the total destruction of the toruism industry for another oil spill to occur here in this harbor; then I say we have not learned our lesson, and West Indian Company is not telling us what they are going to do at that site. And they are saying that we have no right to tell them what to do on that site. And I'm saying this is wrong; no person and no corporation should be above the law. There are too many unanswered questions about what is going on here in the territory, especially with this particular project. I'm not against development, but planned development. We should have control of what is happening. Change, yes; but controlled change. For years we have heard legislators talked about planned development. We have never had any five or ten year plan put in. Section 909 of the Coastal Zone Act specifically talks about areas of special concern or particular concern. They were never iden-

tified, the report was never submitted to the legislature. The question is whether or not this government is going to take control of the lands under its jurisdiction [68] or whether or not we are going to abdicate that right to a foreign entity? And I say, the time to stop it is now. The time to correct that situation is now. And I intend to vote for repeal of these two bills in which we gave up our rights.

SENATOR HODGE: Senator Stridiron. Senator Berry. Senator Rouss. Senator Shatkin. Anybody waiting to speak last? You wish to give up the right to speak?

SENATOR STRIDIRON: Mr. President.

SENATOR HODGE: Senator Stridiron.

SENATOR STRIDIRON: Mr. President, I rise in opposition to the bill. Senator Magras read from a book written in 1932; but let me read from a book which is the law of the land, that is, the Virgin Islands Code. Let me read specifically from a section of the Virgin Islands Code, something that should be dear to the heart of all legislators, as well as all private citizens in this community. It says: "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty or property, without due process of law or deny to any person their equal protection of the laws". That is the Bill of Rights for the people of the Virgin Islands. Another portion of the Bill of Rights set forth in this book said: "No law impairing the obligations of contracts shall be enacted."

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[73] SENATOR HODGE: Senator Berry.

SENATOR BERRY: Thank you, Mr. President.

Good morning, colleagues. I have listened to all the testimonies here this morning—some apply to the issue at hand, some of them dealt with people's lack of courage or the fact that it's an election in November or September, and we cannot make decisions because we are being controlled by the people that are supposed to elect us to office. And I stand here today, and I say "the lack of courage" come frm people in here when they voted to increase the real property taxes, to give raises to union employees, that were never coming. And, today, they are coming in to repeal it. That's where the lack of courage starts. So,

let's talk about courage, let's be specific. People running because union employees said you have to give me an increase; but today you are going to repeal the same monies that you were going to give them the increase last time. Secondly, there are those who say, this is an election year, and why did this issue come up; it was the Fourteenth Legislature that passed the legislation that allowed WICO to do what they are doing today. So, we are saying that. I am saying that this body did not have the authority to give title of submerged lands to a private entity, and since you didn't have that authority, the [74] contract is invalid. So, we have to be concerned, my colleagues, about repealing a valid contract, because if you never had the authority to enter into that contract, you were operating at the moment—based on your conscience, as you refer to it or lack of information, I would refer to it—but lack of authority to enter into a contract; makes the contract invalid. This is why, today we also have on the book the Rogge contract, which has not built one project yet. And that, also is an invalid contract, but, again, the people of the Virgin Islands are going to wait this election and find out how many houses were built, how many schools were built, why your airport is being built and—I'm saying to you, there are colonial mentalities in this legislature; and it is sad, because this is 1986 when we should be seeking more self-government for the control of the Virgin Islands, trying to settle areas in our government where we have to be concerned—when the federal government increases taxes or gives tax cuts and we are here not being controlled of our destiny—this is one of the issues that we should be talking about. But I will tell you one thing; when I vote today to repeal that contract it's based on the fact that I don't want any colonial power trying to control any land in these islands, and it has nothing to do with lack of counsel; it has to do with my feeling of more self-government for the people of the Virgin Islands. [75] And this is an issue I have been discussing from 1983, when I came into this legislature, but there are people here who want to live in the dark ages, and they can go ahead living in those times. But we have to move forward, we have to deal with the issues at hand; and there are people here who feel that these lands should not have been turned over to WICO. Let's make

that decision today. But I also would like to agree with Senator Cintron; we are wasting out time if we don't get ten votes here today. So, we are wasting our time, the people's time, and everyone's time, because we are providing—it's a circus, when you waste time having hearings, and then come in here, vote, because, you know, it's not going to pass or because you don't think it will get ten votes. So, you have done your homework. It is important for each senator to stand up and rise to the occasion, and standup and influence their colleagues who felt that we should not vote on this issue; so we could, at least move this important decision into court, so we can pursue it further. Mr. President, I hope my colleagues—who are on the borderline—will consider the fact that we cannot get a decision in court if we don't repeal the contract or do what Senator Shatkin is saying, rezone the property, hoping that, if that is done, the company would not want to continue filling in the harbor, because there will be no benefits for them through commercial **[76]** activities. That's a long shot approach. I'm willing to support both approaches. I have no problem, because both would cause the agreement to end up in court. Thank you, Mr. President.

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[43] SENATOR HODGE: Senator Bryan?

SENATOR BRYAN: I think Senator Stridiron is playing a little game with us here. The land that is right there, if you can see it, you can walk through those sands and get in the water. So I'm saying that that land, if you read Act 4700 and the agreement, makes reference to certain concessions to West Indian Company. The repeal of those acts, in fact, would stop West Indian Company and those involved believing that that land was West Indian Company land. It is not West Indian Company land. So I'm saying while it is the people's land, we rezoning it public for the people. That's all we are saying. We are not saying continue to dredge. They have already started the dredging already. Before there wasn't all that sand there before they started to dredge. So they created some land. So I'm saying that that they created recently, plus what was there previously, is now public.

But at the same time we are repealing Acts 4700 and 3326, is in fact saying that the Legislature and the Governor and all involved had no authority to give away the trust lands or the submerged lands.

So we are saying two things. The land belongs to the people, and we are now zoning it public for the people. Am I clear?

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